Supreme Court, U. S.
FILED
OCT 6 1978
MICHAEL RODAK, JR., CLERK

78-576

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1978.

**No. A-301**

AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO,
*Petitioner,*

*vs.*

WINN-DIXIE STORES, INC.,
*Respondent.*

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.**

JOSEPH M. JACOBS,
LINDA R. HIRSHMAN,
STEPHEN B. HORWITZ,
201 North Wells Street, Suite 1900,
Chicago, Illinois 60606,
*Attorneys for Petitioner, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO.*

Of Counsel:
JACOBS, BURNS, SUGARMAN & ORLOVE,
201 North Wells Street, Suite 1900,
Chicago, Illinois 60606,
Telephone: 312/372-1646.

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565 • 65

## INDEX.


PAGE

Opinions Below ..... 1

Jurisdiction ..... 2

Questions Presented ..... 2

Statute Involved ..... 2

Statement of the Case ..... 3

A. Introduction ..... 3

B. The Board's Findings of Fact and Remedial Order 4

C. The Decision of the Court of Appeals..... 6

Reasons for Granting the Writ ..... 6

Conclusion ..... 15

Appendix A ..... 17

Appendix B ..... 34

Appendix C ..... 39


### CITATIONS.

*Cases.*


American Laundry Machinery Co. v. NLRB, 174 F. 2d 124 (6th Cir. 1949) ..... 12

Dura Corp. v. NLRB, 380 F. 2d 970 (6th Cir. 1967) . 13, 14, 15

Golden State Bottling Co. v. NLRB, 414 U. S. 168 (1973) 7

Kroger Co. v. NLRB, 401 F. 2d 682 (6th Cir. 1968) . . . 14, 15

Lion Oil Co. v. NLRB, 245 F. 2d 376 (8th Cir. 1957) . . . . 12

NLRB v. C & C Plywood Corp., 385 U. S. 421 (1967) . . . 7

NLRB v. Food Store Employees Local 347 (Heck's, Inc.), 417 U. S. 1 (1974) ..... 12

NLRB v. Great Dane Trailers, 388 U. S. 26 (1967) ..... 12
NLRB v. United Insurance Co., 390 U. S. 254 (1960) .... 7
NLRB v. Walton Mfg. Co., 369 U. S. 404 (1962) ..... 7
News Union of Baltimore v. NLRB, 129 U. S. App. D. C. 272, 393 F. 2d 673 (1968) ..... 7
Stark Ceramics Inc. v. NLRB, 375 F. 2d 202 (6th Cir. 1967) ..... 12
Universal Camera Corp. v. NLRB, 340 U. S. 474 (1951). 7, 9
Winn-Dixie Stores, Inc., 207 NLRB No. 53 (1973) ..... 4
Winn-Dixie Stores, Inc., 181 NLRB 611 (1970) ..... 4
Winn-Dixie Stores, Inc., 170 NLRB No. 198, *enf'd* 413 F. 2d 1008 (5th Cir. 1969) ..... 4
Winn-Dixie Stores, Inc., 166 NLRB 227, *enf'd* 414 F. 2d 786 (5th Cir. 1969) ..... 4
Winn-Dixie Stores, Inc., 157 NLRB 54, *enf'd* 379 F. 2d 958 (4th Cir.), *cert. denied*, 389 U. S. 952 (1967) .... 4
Winn-Dixie Stores, Inc., 147 NLRB 788, *enf'd as modified*, 361 F. 2d 512 (5th Cir.), *cert. denied*, 385 U. S. 935 (1966) ..... 4
Winn-Dixie Stores, Inc., 143 NLRB 848, *enf'd*, 341 F. 2d 750 (6th Cir. 1965), *cert. denied*, 382 U. S. 830 (1966) 4
Winn-Dixie Stores, Inc., 138 NLRB 1355, *enf'd per curiam*, 324 F. 2d 502 (5th Cir. 1963); (civil contempt) 353 F. 2d 76 (5th Cir. 1965); (criminal contempt) 386 F. 2d 309 (5th Cir. 1967) ..... 4

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1978.

**No. A-301.**

AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO,
*Petitioner,*

*vs.*

WINN-DIXIE STORES, INC.,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on July 5, 1978.

### OPINIONS BELOW.

The Court of Appeal's initial opinion, dated February 17, 1978, is reported at 567 F. 2d 1343 and is reproduced as Appendix A. An amendatory opinion was issued by the Court of Appeals on June 26, 1978 that is reported at 575 F. 2d 1107 and is reproduced as Appendix B. The findings, conclusions and order of the National Labor Relations Board are

reported at 224 NLRB No. 190 (1976) and is reproduced as Appendix C.

## JURISDICTION.

The judgment of the Court of Appeals was entered on July 5, 1978. Petitioner's timely petition for rehearing and suggestion for rehearing en banc was denied on June 26, 1978. The jurisdiction of this Court is invoked under 28 USC § 1254(1).

## QUESTIONS PRESENTED.

1. Whether the Court of Appeals erred in reversing the finding of the National Labor Relations Board that the Winn-Dixie profit-sharing plan mandated the illegal forfeiture of employees' long-standing profit-sharing accounts, if employees became covered by a union pension, in violation of Sections 8(a)(1), (3) and (5) of the National Labor Relations Act; and

2. Whether the Court of Appeals erred in refusing to enforce the remedy selected by the National Labor Relations Board for Winn-Dixie's illegal insistence that employees covered by a union pension must be excluded from the Winn-Dixie profit-sharing plan, the reason for the Court's rejection of the Board's remedy being that Winn-Dixie's illegal refusal to bargain over eligibility for pension and profit-sharing yielded a collective bargaining agreement that made the Board's remedy for the pre-existing violation of Section 8(a)(1) and (3) too "speculative".

## STATUTE INVOLVED.

The National Labor Relations Act, as amended, 29 USC § 151, *et seq.* Section 7, 29 USC § 157:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ."



Section 8, 29 USC § 158:

> "(a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> * * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization; * * *
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

Section 10, 29 USC § 160:

> "(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: *Provided,* That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: * * *
>
> * * * * *
>
> (e) * * * The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *"

## STATEMENT OF THE CASE.

### A. Introduction.

The administrative complaint issued by the General Counsel for the NLRB charged Respondent, Winn-Dixie, with twenty

(20) specific violations of the National Labor Relations Act.[1] Winn-Dixie prevailed in its challenge to the Board's order as it pertained to the profit-sharing plan, but other major aspects of the Board's order were enforced.

### B. The Board's Findings of Fact and Remedial Order.

Since 1946, Winn-Dixie has maintained a profit-sharing plan, whereby *eligible* employees are afforded a means to share in the profits of the Company. Like most profit-sharing plans, Winn-Dixie makes annual contributions of a percentage of profits to separate employee accounts on a prorata basis. In addition to the ordinary profit-sharing provisions for payout at termination of employment, participating low wage employees—those who earn less than $8,500 a year—can receive an annual $300 cash bonus. (A. 4, 7, 84.)[2] All unit employees would have qualified for the bonus, because they all earned less than $8,500 per year. (A. 5.)

In 1968, the profit-sharing plan added a provision, Article II, Section 2.4(b), which excluded from participation therein:

> Employees who, as a result of collective bargaining, have entered into a written agreement with Employer by which Employer agrees to contribute funds for the benefit of such employees to some other form of Pension or Retirement Program (other than "Program" herein). (GCX 19, Art. II, § 2.4(b).)

1. The court of appeals acknowledged that Winn-Dixie has had a history of "labor-controversies". 567 F. 2d at 1346. Respondent's violations of federal labor laws are well documented: See *e.g., Winn-Dixie Stores, Inc.*, 207 NLRB No. 53 (1973); *Winn-Dixie Stores, Inc.*, 181 NLRB 611 (1970); *Winn-Dixie Stores, Inc.*, 170 NLRB No. 198, *enf'd.* 413 F. 2d 1008 (5th Cir. 1969); *Winn-Dixie Stores, Inc.*, 166 NLRB 227, *enf'd*, 414 F. 2d 786 (5th Cir. 1969); *Winn-Dixie Stores, Inc.*, 157 NLRB 54, *enf'd*, 379 F. 2d 958 (4th Cir.), *cert. denied* 389 U. S. 952 (1967); *Winn-Dixie Stores, Inc.*, 147 NLRB 788, *enf'd as modified*, 361 F. 2d 512 (5th Cir.), *cert. denied*, 385 U. S. 935 (1966); *Winn-Dixie Stores, Inc.*, 143 NLRB 848, *enf'd*, 341 F. 2d 750 (6th Cir. 1965), *cert. denied*, 382 U. S. 830 (1966); *Winn-Dixie Stores, Inc.*, 138 NLRB 1355, *enf'd per curiam*, 324 F. 2d 502 (5th Cir. 1963); (civil contempt) 353 F. 2d 76 (5th Cir. 1965); (criminal contempt) 386 F. 2d 309 (5th Cir. 1967).

2. All references herein are to the Appendix filed by the parties in the Court of Appeals.



When collective bargaining negotiations commenced in August 1969, the Union's proposals included a demand for continuation of the profit-sharing plan as well as introduction of a pension plan. Throughout the negotiations, the Company maintained the unqualified and unyielding position that coverage by both its profit-sharing plan and the Union sponsored pension system was precluded. (A. 5-6, 80, 82; Tr. 351-352, 388, 395, 867, 1628-1629, 1637, 1892.)

In November 1970 the Union filed its original unfair labor practice charge contending, *inter alia*, that the exclusionary clause in the Company profit-sharing plan was illegal. Thereafter, and while explicitly disclaiming any intent to waive employees' statutory rights, the Union executed a collective bargaining agreement which, at Company insistence, excluded unit employees' participation in the profit-sharing plan and their forfeiture of existing accounts.

The Board found that the Company's refusal to bargain with the Union over coverage by both the Company profit-sharing plan and the Union pension plan constituted violations of Section 8(a)(5) and (1). Most pertinent to the questions presented herein, the Board also found that the existence of the exclusionary clause (§ 2.4(b)), which mandated forfeiture of unit employees' vested rights in their profit-sharing accounts, violated Section 8(a)(3).

To remedy this unfair labor practice, resulting from the forfeiture of unit employees' profit-sharing accounts, and the exclusion of employees from future participation, the Board, *inter alia*, ordered the Company "to make said employees' accounts whole for any losses of Company contributions . . . from the date Respondent forfeited the accounts and terminated further eligibility. . . ."

### C. The Decision of the Court of Appeals.

On petitions to review and cross-applications to enforce the Board's Order, the court held that "The existence of [exclusionary] clause 2.4(b) violated section 8(a)(3) of the Act, and the Company's refusal to bargain over coverage under both plans violated section 8(a)(5) and (1) of the Act." 567 F. 2d at 1348. While the court of appeals found that Winn-Dixie discriminated against Union adherence and breached its bargaining obligation by conditioning participation in the Company profit-sharing plan on the Union foregoing bargaining over a pension plan, the Court of Appeals nevertheless concluded that the Company did not violate the Act when it carried out these discriminatory threats and actually excluded employees from the profit-sharing plan and forfeited their accounts as a condition of a collective bargaining agreement.

In its amendatory opinion the Court of Appeals held that it could not sustain the Board's position in the forfeiture issue because "The record does not present substantial evidence that the provisions of the plan mandated forfeiture of existing accounts in that the Company violated its duty to bargain by insisting on forfeitures." 575 F. 2d at 1109.

## REASONS FOR GRANTING THE WRIT.

1. The holding of the Court of Appeals that the "company [profit-sharing] plan did not mandate forfeiture" 575 F. 2d at 1109, is contrary to the statutory command of Section 10(e) of the Act that the "findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive," and the decisions of this Court which have interpreted and applied this standard of judicial review.

The plain meaning of the exclusionary clause contained in Section 2.4(b) of the profit-sharing plan compelled the finding



reached by the Board that coverage under a collectively bargained pension plan resulted in a forfeiture of employees' profit-sharing accounts. Assuming, *arguendo*, that Section 2.4(b) is susceptible to an interpretation other than the one adopted by the Board, the "choice between two fairly conflicting views" is for the Board alone to make. *NLRB* v. *United Insurance Co.*, 390 U. S. 254, 260 (1960). Thus, the substantial evidence test does not afford a reviewing court the power to substitute its determinations for the Board's findings of fact. This was the standard this court pronounced in its seminal decision in *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474, 488 (1951):

> Nor was it [the substantial evidence test] intended to negative the function of the Labor Board as one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect. *Nor does it mean that even as to matters not requiring expertise a court may displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo.*[3]

As applied by this Court, the substantial evidence test permits the Board to discredit testimonial evidence in favor of documentary evidence and the Board's responsibility, as trier of fact, also includes the determination of what inferences are to be drawn from the evidence. *Golden State Bottling Co.* v. *NLRB*, 414 U. S. 168, 173-174 (1973); *NLRB* v. *Walton Mfg. Co.*, 369 U. S. 404, 408 (1962).

The Company's own witness testified that even had the bargaining committee agreed to allow the employees to "participate" in the profit sharing plan alongside the Union pension, the Profit

3. Emphasis supplied. Where, as here, the Board's findings of fact concern a contractual type of arrangement pertaining to conditions of employment, the Board is engaged in the exercise of its expertise. *cf. NLRB* v. *C & C Plywood Corp.*, 385 U. S. 421 (1967); *News Union of Baltimore* v. *NLRB*, 129 U. S. App. D. C. 272, 393 F. 2d 673, 678 (1968).

Sharing Committee would not have allowed them to do so. (Tr. 1636.) The forfeitures are implicit in the exclusion of employees from participation in the plan. To "participate" means "partake," "take part," "share". (Webster's Seventh New Collegiate Dictionary.) Exclusion from participation precludes such sharing; how could an excluded employee even share in a payout of his account? The provisions of the profit sharing plan foreclose any alternative interpretations. Under § 2.4, an employee covered by a pension is not an "employee" as defined by the plan. (G. C. 19, § 2.4.) Yet, all participation in the plan is limited to "participating employees". (G. C. 19, § 2.5.) The employees covered by a group pension do not even qualify as "withdrawn employees" under the plan, because the plan defines a "withdrawn employee" as an individual whose employment has been terminated, which is obviously not the case.

Nor are these employees entitled to payout of their accounts, vested or not under §§ 7.2 and 7.3 of the Plan. Payouts are limited to instances of an employee's retirement, disability, discharge or voluntary termination. The plan contains no provision for payout, immediate or delayed, upon obtaining pension coverage.[4]

The court of appeals, then, has substituted its determination of the facts in place of the findings of fact rendered by the National Labor Relations Board. The essence of that factual inquiry was the Board's eminently reasonable interpretation of section 2.4(b) of the Company's profit-sharing agreement as intending a forefeiture of profit-sharing accounts upon the

4. The existence of provisions in the profit-sharing plan which deal with "forfeitures" under certain contingencies led the Court of Appeals to surmise that "The plan says nothing about forfeiture of existing accounts of employees who became covered by a pension plan as a result of collective bargaining." 575 F. 2d at 1109. The Court of Appeals was clearly substituting its inference in place of those drawn by the Board, which found that the exclusionary clause, § 2.4(b), by its terms resulted in the forfeiture of vested accounts at the very moment an employee is covered by a collectively-bargained pension plan.



execution of a collective bargaining contract. This forfeiture of accrued benefits has in fact occurred (as Winn-Dixie intended) because employees exercised their federally protected right under Section 7 of the National Labor Relations Act to "join . . . to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining. . . ." Nevertheless, the court of appeals has held that substantial evidence in the record does not support Winn-Dixie's very own understanding of a document promulgated by a company that has gained notoriety for thwarting this nation's labor laws. (See footnote 1, *supra.*)

In the process of striking down the Board's interpretation of the exclusionary rule—the factual inquiry presented—the court fails to cite any portion of the record which supports an interpretation contrary to the Board's and, indeed, no such evidence (let alone substantial evidence) exists that favors the court's substituted interpretation. By replacing the interpretation of section 2.4(b) as rendered by the Board, with its own, the court of appeals surely "misapprehended" and "grossly misapplied" the fundamental injunction of the substantial evidence doctrine:

> Nor does it mean that even as to matters not requiring expertise a court may displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo.

*Universal Camera Corp.* v. *NLRB*, 340 U. S. 474 488 (1951).

The court's acknowledgement of "the employees' plight" does not stand as consolation for the court's divergence from the substantial evidence test. Petitioner respectfully submits that this Court's grant of the Writ of Certiorari, when as here, the substantial evidence test "appears to have been misapprehended or grossly misapplied", is necessary to vindicate these important federal rights. *Universal Camera Corp.* v. *NLRB*, 340 U. S. at 491.

2. The court erred in its amended opinion holding that the Board's remedy was too "speculative". For purposes of assessing the court's error in this case, the record reveals the following pertinent matters. As the Board found, and the court affirmed, throughout the period of Union representation at issue here, the Company maintained a provision in its profit sharing plan that excluded from coverage employees covered by a Union pension. The Board held, affirmed by the court, that such a provision discriminates against Union membership, in violation of the prohibitions of § 8(a)(3) of the National Labor Relations Act.[5] The Board also found, also affirmed by the court, that the Company's refusal, in conformity with the mandate of the illegal exclusion, to bargain with the Union over the maintenance of participation in the Company profit sharing if collective bargaining yielded a pension, also violated § 8(a)(1) and (5) of the Act. When bargaining yielded a pension, in 1971, two events occurred: one, the Company excluded all employees with pensions from any further participation in this profit sharing plan, and, two, the Company forfeited the existing accounts. Accordingly, as a remedy for these violations of § 8(a)(1), (3) and (5), the Board ordered the Company to reinstate the employees in the accounts that were forfeited and to include all employees in all participation from which they had been excluded, as a result of the operation of the illegal clause. The court of appeals reversed the Board on all respects of remedy.

In its initial opinion, the court found, as set forth in Part I of this Petition for writ of certiorari, that the document in question—the profit sharing plan—did not actually mandate the forfeiture of existing accounts. As set forth above, this holding was not only erroneous on the facts of what the document said; it

5. The impact of such a mandatory rule is best illustrated by the fact that at the conclusion of the 1971 collective bargaining agreement, when the Company forfeited the existing accounts and excluded eligible employees, 26 employees had accounts totalling over $100,000. At that time, no covered employee earned over $8500.00 per year. (567 F. 2d at 1347.)



was also an inappropriate extension of the court's function of review into the Board's well-founded discretion to interpret such evidence.

However, the court could not find that the profit sharing plan failed to mandate the exclusion of future participation upon achievement of a Union pension, in face of the plain wording of the provision at issue and the Company negotiators' own admissions that providing for future participation alongside Union pension would have violated the Company's arrangement. (Tr. 1636.) Nonetheless, the court reversed the Board's remedy of establishing ongoing or new accounts for the employees thus illegally excluded, in violation of § 8(a)(1), (3) and (5); the Court justified this incursion into the Board's authority to select remedies as follows: The Court recognized that the Company's intransigent refusal to agree to continued profit sharing alongside a Union pension resulted from illegal discrimination and constituted an illegal refusal to bargain. However, the court found, the conclusion of a collective bargaining agreement without profit sharing coverage precluded the employees from a remedy for the preexisting violations:

> "The Board justifies this remedy as an effort to recreate the status quo ante existing before adoption of the 1970 contract. It obviously doest not. The unit employees have been covered by the pension plan proposed by the union since 1970. The Board order creates a status novus which would exist only if the employees had succeeded in getting simultaneous coverage under both the union's pension plan and the company's profitsharing/retirement plan.
>
> Although we share with the Board a concern that the employees cannot be made whole for any harm they may have suffered as a result of the company's refusal to bargain over "double coverage," we think that the Board's remedy here is too speculative and that it is unduly burdensome on the employer. Even though the company violated the Act, there is no way to evaluate, or even to identify, the harm flowing to the employees as a result of that violation." 567 F. 2d at 1351.

Upon consideration of the Union's petition for rehearing, the court amended its order to note specifically that in so ruling, it did not construe the collective bargaining agreement as a waiver.[6] Rather, it held, the intervening collective bargaining agreement establishing pension rights make the Board's order of reinclusion in profit sharing too "speculative".[7]

It is, of course, well-established that the Board's selection of remedy may not be overturned, absent "crystal clear" error. *NLRB* v. *Food Store Employees Local 347 (Heck's, Inc.)*, 417 U. S. 1, 94 S. Ct. 2074 (1974). In reversing the Board's selected remedy on grounds that an intervening collective bargaining agreement—itself the product of established bad faith bargaining—rendered the remedy "speculative", the court here violated every precept of this Court's ruling in *Heck's*. The court's reversal of the Board means that a remedy for violations of § 8(a)(3), where the employee victims ultimately also benefited from Union representation by achieving a collective bargaining agreement, can never be obtained.

To the contrary, the traditional remedy for violation of § 8(a)(3) is to make the employees whole for the losses they incurred as a result of the employer's discriminatory actions. *Inter alia, NLRB* v. *Great Dane Trailers*, 388 U. S. 26, 30 (1967). Whether the employees also contemporaneously reaped some of the fruits of collective bargaining is utterly immaterial. The law mandates that these employees be made whole for the losses resulting from the execution of the employer's illegal

6. Of course, no such waiver could result from the bad faith bargaining involved here. *American Laundry Machinery Co.* v. *NLRB*, 174 F. 2d 124 (6th Cir. 1949); *Lion Oil Co.* v. *NLRB*, 245 F. 2d 376 (8th Cir. 1957); *Stark Ceramics Inc.* v. *NLRB*, 375 F. 2d 202 (6th Cir. 1967).

7. There can be no question that only the intervening collective bargaining agreement caused the alleged "speculativeness". No party ever contested that the value of the employees' accounts was determined to the penny in 1971. No one contests that by applying the profit-sharing plan formula to the work force since 1971 all the new accounts can be calculated to the penny. The profit sharing plan at Winn-Dixie is susceptible to absolute mathematical calculation, with no factor for discretionary acts.



policy. Such losses can be calculated to the penny. Whether Winn-Dixie would have agreed to the 1971 collective bargaining contract, knowing that the Board would eventually enforce the Labor Act against it, is irrelevant.

The court cited no authorities for its novel doctrine. Certainly, no such concept exists under present law. To the contrary, this ruling by the court of appeals is in direct conflict with the ruling of the Court of Appeals for the Sixth Circuit in *Dura Corp.* v. *N. L. R. B.*, 380 F. 2d 970 (6th Cir. 1967).

In *Dura*, as here, the Company maintained a profit sharing plan that discriminated against union members. In *Dura*, as here, during bargaining, the company refused to bargain about continued coverage. In *Dura*, as here, the union filed unfair labor practice charges, and, thereafter, signed a collective bargaining agreement with the company. In *Dura*, as here, the Board found that the employer's policy violated § 8(a)(3) by excluding its employees from profit sharing and ordered the remedy that

> "the Respondent be ordered to amend the foregoing profit-sharing plan by the elimination of the provision disqualifying employees from participation therein because they have become members of a collective-bargaining unit or because they have chosen to be represented by a labor organization in collective bargaining in an appropriate unit. *I will also recommend that the Respondent be ordered to restore and permit participation in the profit-sharing plan to all old and new salaried employees who were or have been so disqualified, with all the interest, emoluments, rights, and privileges in said plan that would have accrued to them but for such disqualification.*" 156 NLRB 285 (1965). (Emphasis supplied.)

On appeal, the court of appeals rejected the employer's contention that the Union should be precluded from pursuing the profit sharing violations, because of the intervening collective bargaining agreement, containing a broad waiver of all demands not encompassed in the Agreement. The court enforced the Board's order, including the full reinstatement

remedy. In sum, in holding that the intervention of a collective bargaining agreement, providing additional rights and benefits, rendered the remedy of reinstatement too speculative, the court here was in direct conflict with the ruling in *Dura*. It strains credulity to believe that the collective bargaining agreement in *Dura* did not provide the employees with substantial additional benefits. It contained a broad "zipper" clause—a *quid pro quo* for such benefits. Yet, the Court enforced the remedy selected by the Board for the violations of § 8(a)(3), regardless of what the employer "would have done" in collective bargaining, had it known of its obligation to reinstate the employees.

The utter inconsistency of the court's opinion in this case is reflected in its selection of the achievement of pension benefits in the collective bargaining agreement as the reason that the court cannot also "bestow" the employees with their profit-sharing rights. This court already properly held that the two benefits were not even fungible. Thus, the court's opinion would establish that victims of 8(a)(3) cannot be made whole, if collective bargaining resulted in any gain to them. This holding is in direct conflict with the outcome in *Dura*.

In essence, after holding that the Company offered the Union an illegal bargain, the court then insured that the Company got the benefit of it. In the future, this would mean that an employer can escape liability under 8(a)(3) for depriving employees of any benefits or wages on grounds of Union representation simply by committing the additional violation of refusing to bargain and then contending it would never have concluded any collective bargaining agreement if it had known of its liability for existing violations.

Finally, the court's citation to *Kroger Co.* v. *N. L. R. B.*, 401 F. 2d 682 (6th Cir. 1968), is totally inapposite. In *Kroger*, the profit-sharing plan was purely voluntary: voluntary as to participation, amount and withdrawal, comparable to a



savings account. Accordingly, the court could not calculate the *amounts* necessary to make the employees whole. Here, as the record reflects, participation in the plan was completely governed by rigid formulae: amount earned, profits of the Company, work longevity, with no options to the employees. Accordingly, the court could not—and did not—find that the employees should be excluded from remedial relief, because the *amounts due* were too speculative. Yet that was the sole pertinent issue in *Kroger*.[8] Even in finding speculativeness of amount, the *Kroger* Court noted the parallel between these victims and a victim of illegal discharge (401 F. 2d, at 689). In seeking to justify a similar outcome from these diametrically dissimilar facts, the court could only rest on the intervention of the collective bargaining agreement here. That outcome conflicts directly with *Dura* and finds no support elsewhere.

## CONCLUSION.

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted.

JOSEPH M. JACOBS,
LINDA R. HIRSHMAN,
STEPHEN B. HORWITZ,
201 North Wells Street, Suite 1900,
Chicago, Illinois 60606,
*Attorneys for Petitioner, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO.*

Of Counsel:
JACOBS, BURNS, SUGARMAN & ORLOVE,
201 North Wells Street, Suite 1900,
Chicago, Illinois 60606,
Telephone: 312/372-1646.

8. The *Kroger* court also noted that the Company had no anti-union animus or history. That factor alone renders *Kroger* beyond any application here. See, footnote 1, *supra*.

## APPENDIX A

Nos. 76-2733 and 76-3558.

UNITED STATES COURT OF APPEALS,
Fifth Circuit.

Feb. 17, 1978.

WINN-DIXIE STORES, INC.,
*Petitioner-Cross Respondent,*

*vs.*

NATIONAL LABOR RELATIONS BOARD,
*Respondent-Cross Petitioner.*

AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO,
*Petitioner,*

vs.

NATIONAL LABOR RELATIONS BOARD,
*Respondent.*

Charles F. Henley, Jr., William H. Andrews, Jacksonville, Fla., for Winn-Dixie Stores, Inc.

Elliott Moore, Deputy Associate Gen. Counsel, William R. Stewart, David F. Zorensky, John S. Irving, John E. Higgins, Jr., Carl L. Taylor, N. L. R. B., Washington, D. C. for N. L. R. B.

Linda R. Hirshman, Robert S. Sugarman, Joseph M. Jacobs, Chicago, Ill., for Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO.

Harold A. Boire, Reg. Director, Region 12, N. L. R. B., Tampa, Fla., for other interested parties.

Petitions for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board.

Before WISDOM and GEE, *Circuit Judges*, and VAN PELT*, *District Judge*.

GEE, *Circuit Judge:*

In No. 76-2733, Winn-Dixie Stores, Inc. ("Winn-Dixie" or "the company") petitions this court for review of an order of the National Labor Relations Board ("the Board"), and the Board cross-applies for enforcement of its order. In No. 76-3558, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO ("the union") petitions this court for review of the same Board order. Winn-Dixie has intervened in No. 76-3558; the union has intervened in No. 76-2733.

Winn-Dixie, a Florida corporation with headquarters in Jacksonville, operates a chain of supermarkets throughout the southeastern United States. It has a history of labor controversies and has appeared before the Board and this court several times.[1] The issues involved in this case arise out of incidents taking place in the company's Jacksonville warehouse during the period from 1969 to 1973.

The Board found that Winn-Dixie had violated section 8(a)(3), (5) and (1) of the National Labor Relations Act ("the Act"), 29 U. S. C. § 158(a)(3), (5) and (1), by committing the following acts: (1) maintaining a profitsharing/retirement plan which by its terms precluded coverage of employees who were covered by a pension plan as a result of collective bargaining; (2) refusing to bargain over the possibility of unionized employees getting coverage under both the company's profitsharing/retirement plan and a union-proposed pension plan; and (3) unilaterally increasing insurance benefits and wages.[2] The Board ordered the company to post notices of the Board's action in all the warehouses in the Jacksonville division, to mail a copy of the notice to each employee, to read the notice aloud to the employees, and to grant the union access to bulletin boards for one year. The Board also ordered two forms of monetary relief: (1) with respect to the company's profitsharing/retirement plan, the company must reinstate the funds in the accounts forfeited by employees as a result of the 1970 collective bargaining agreement, open accounts for those employees who would have become eligible for the company plan since 1970, and contribute the funds that should have gone into those accounts including annual payments of up to $300 for those employees eligible for such benefits; and (2) the company must make the unit employees whole for any losses they may have suffered as a result of the company's unfair labor practices by compensating employees for any differences in benefits which exist between the Jacksonville warehouse and another comparable warehouse in the Winn-Dixie system.[3]

The company contests all aspects of the Board's findings and order described above. The union complains of the Board's failure to find additional unfair labor practices and the Board's refusal to award litigation expenses and excess organization expenses.

* Senior District Judge of the District of Nebraska, sitting by designation.

1. See, *e.g.*, *Winn-Dixie Stores, Inc.*, 166 N. L. R. B. 227, *enf'd per curiam*, 414 F. 2d 786 (5th Cir. 1969); *In re Winn-Dixie Stores, Inc.*, 386 F. 2d 309 (5th Cir. 1967) (criminal contempt); *Winn-Dixie Stores, Inc.*, 138 N. L. R. B. 1355, *enf'd per curiam*, 324 F. 2d 502 (5th Cir. 1963).

2. The Board also found Winn-Dixie guilty of other unfair labor practices, but Winn-Dixie does not challenge those findings.

3. The Board ordered certain other remedies, but the company does not challenge them here.

*The Profitsharing Plan*

At all times relevant to the issues in this case, Winn-Dixie has administered a profitsharing plan for its employees. Participation in the plan is voluntary. In order to be eligible for participation an employee must be at least twenty-one years old and have at least five years of continuous employment with the company. Each participating employee is given a separate account to which the company makes annual contributions on the basis of a certain percentage of the company's profits for that year.

Under the plan employees or their heirs become entitled to payment from their accounts upon retirement, death, or termination of employment with the company for reasons other than theft or other conduct detrimental to the company. In addition, the plan provides for annual cash payments of up to $300 for eligible employees who earn under $8,500 per year. All of the unionized employees in the Jacksonville warehouse earned less than this amount.

Until it was amended in 1971, the company's plan contained a provision, Article II, Section 2.4(b), which excluded from participation in the plan:

> Employees who as a result of collective bargaining have entered into a written agreement by which Employer agrees to contribute funds for the benefit of such employees to some form of retirement program.

Thus, by its terms the company plan precluded the possibility that the unit employees could be covered simultaneously by the company plan and a pension plan proposed by the union.[4]

4. In 1971 the company amended the clause to exclude only those:

> Employees who, as a result of collective bargaining, have entered into a written agreement with the Employer by which the Employer has agreed to contribute funds for the benefit of such employees to some form of Pension or Retirement Program (other than "Program" herein) and *who have been excluded from this Program by agreement of the parties.*

(Emphasis added.)



The company's position at the bargaining table was that such "double coverage" was not a negotiable matter. The ALJ found no violation in the existence of the clause or in the company's adamant refusal to bargain over dual coverage. The ALJ reasoned that since the company plan was really a retirement or pension plan, the company could rightfully refuse to bargain over simultaneous coverage under two pension plans.

The Board reversed the ALJ on the grounds that the company plan was funded by a percentage of company profits and thus differed from the standard pension plan under which an employee can be sure that his or her account will increase by a set amount every year. According to the Board, the fact that the company's profitsharing plan provided for disbursal of benefits at a time normally associated with retirement plans did not change the basic nature of the company's plan. In the alternative, the Board found that even if the company's plan was a pension plan, it included one provision not usually associated with retirement plans, *viz*, eligible employees earning less than $8,500 per year were entitled to receive up to $300 per year in cash payments. Thus, the company's plan was in part a profitsharing plan providing for annual cash bonuses.

In its brief the Board cites *Kroger Co.* v. *NLRB*, 401 F. 2d 682 (6th Cir. 1968), *cert. denied*, 395 U. S. 904, 89 S. Ct. 1743, 23 L. Ed. 2d 217 (1969), for the proposition that a company cannot exclude from participation in a profitsharing plan those employees who acquire a pension plan as a result of collective bargaining. Kroger maintained both a profitsharing plan and a retirement plan. The Sixth Circuit held that the exclusionary clause in the profitsharing plan, the only company plan at issue in that case, and Kroger's refusal to bargain over coverage of the unionized employees under both the union pension plan and the company profitsharing plan violated section 8(a)(5) and (1) of the Act.

Winn-Dixie would distinguish *Kroger* on the ground that Kroger had two plans, i.e., one a profitsharing plan and the

other a retirement plan. The exclusionary clause in the profitsharing plan could not be supported by any "double coverage" argument since Kroger's profitsharing plan was in no sense a retirement plan. Exclusion of the unionized employees from Kroger's plans left them with only the union-proposed pension plan, while the remaining employees had both a pension plan and a profitsharing plan.

Here Winn-Dixie maintains one plan which incorporates both profitsharing and retirement aspects. Thus, we are presented with a more complex situation than was the Sixth Circuit in *Kroger*.

Without attempting to discern the "basic nature" of the Winn-Dixie plan and without deciding whether a company may refuse to bargain over exact duplication of benefits, we believe that Winn-Dixie's position violated its statutory duty to bargain. Even assuming that there is no duty to bargain over duplicate benefits, a company's duty to bargain becomes more and more clear as the differences in the two plans become greater. If this were not the case, a company could avoid the effect of *Kroger* by merely consolidating a pension plan and a profitsharing plan into one combined plan.

Here the differences between the company plan and the union plan are sufficient to give rise to a duty to bargain over coverage under both plans. The company plan is funded by contributions directly related to company profits for a given year. The union plan is funded by fixed contributions which do not vary from year to year with the successes or failures of the company. The company's plan is voluntary; the union's plan is not. An employee becomes eligible under the company plan after five years; under the union plan an employee becomes eligible after sixty days. The company plan provides for cash payments of up to $300 per year. There can be no doubt that the prospect of annual payments in such an amount would be of great interest to the unionized employees, all of whom earned less than $8,500 per year. We therefore conclude that there is substantial



evidence to support the Board's finding that the existence of the original clause 2.4(b) violated section 8(a)(3) of the Act, and the company's refusal to bargain over coverage under both plans violated section 8(a)(5) and (1) of the Act.

The Board also held that the company's insistence that eligible employees forfeit their existing accounts under the company plan violated section 8(a)(5) and (1) of the Act and that the company's actual forfeiture of these employees' interests violated section 8(a)(3) of the Act. According to the Board, the fact that the existence of clause 2.4(b) and the company's refusal to bargain over "double coverage" are violations dictates that insistence on forfeiture and actual forfeiture were likewise violations. We fail to discern the necessary connection and refuse to enforce this aspect of the Board's order because it is not supported by substantial evidence.

Apparently the first mention of forfeiture came after the union requested the wage increases included in a contract which Winn-Dixie had recently entered with the Teamsters Union in New Orleans. Prior to this time the company and the union had been bargaining on a provision-by-provision basis. The company told the union that it could have the New Orleans contract but only if it was willing to take it *in toto*. That contract provided for the creation of a union pension plan and for forfeiture of any existing accounts under the company profitsharing/retirement plan.

The union negotiators expressed a willingness to accept the entire New Orleans contract except for the forfeiture provision. The company insisted that the union take the whole contract or else the parties would have to go back to provision-by-provision bargaining. The union then agreed to the entire contract, subject to ratification by the employees.

We refuse to hold that a company's insistence that a union accept a package proposal or else go back to piecemeal negotiations constitutes a violation of that company's duty to bargain in good faith. We also refuse to hold that the actual forfeiture

constitutes discrimination as that term is used in section 8(a)(3) of the Act. Section 8(a)(3) prohibits discrimination among employees by an employer in such a manner as to encourage or discourage membership in any labor organization.

It is true that in some sense causing those employees with existing accounts to forfeit the funds already accumulated in those accounts "discriminates" among employees. Some employees lose something and others do not. However, the only way this tends to discourage union membership is that it creates different interests among the employees such that they will be less willing to band together and to have one authority represent their collective interests.[5] Such will be the result of any action by an employer which causes employees to receive anything but absolutely equal benefits. A seniority system creates disparate interests among the employees, as does the existence of different pay scales for different jobs. Absent a finding that the company implemented the forfeiture, to which the union had agreed, for the purpose of discouraging employees from union membership, the Board could not properly conclude that the company's action violated the Act.

*Unilateral Increases*

In 1969 the company granted increased insurance benefits to the unit employees without first notifying the union and without affording the union any opportunity for negotiation. Since insurance benefits are a mandatory subject of collective bargaining, the company's action was a clear violation of section 8(a)(5) of the Act. *See, e.g., NLRB* v. *Amoco Chemicals Corp.*, 529 F. 2d 427 (5th Cir. 1976); *NLRB* v. *Citizens Hotel Co.*, 326 F. 2d 501 (5th Cir. 1964).

In addition to increasing insurance benefits unilaterally in 1969, the company also raised wages by $.25 per hour without

5. In some sense causing these employees to lose their accounts made the interests of the employees more uniform. Before the forfeiture, some employees had accounts and some did not; after the forfeiture, no employee had an account.



the union's assent. The company first notified the union of its desire immediately before a decertification election on August 1. After the union won the election, the parties met and the company asked the union to agree to this increase which the company said was necessary to halt the high turnover of employees. The union, which wanted to discuss a wide variety of changes in the collective bargaining agreement, would not agree. The next day the company informed the union that it was implementing the increase.

The ALJ found this to be a violation of the company's section 8(a)(5) duty to bargain. The Board affirmed summarily.

Winn-Dixie challenges this finding on the grounds that *NLRB* v. *Tex-Tan, Inc.*, 318 F. 2d 472 (5th Cir. 1963), and *A. H. Belo Corp. (WFAA-TV)* v. *NLRB*, 411 F. 2d 959 (5th Cir. 1969), *cert. denied*, 396 U. S. 1007, 90 S. Ct. 561, 24 L. Ed. 2d 498 (1970), dictate a contrary result. We agree.

In *Tex-Tan* the Fifth Circuit refused to find a violation of the duty to bargain where the company met and conferred with the union before implementing an increase in wages. In *Belo* the court similarly refused to find a violation where the company had notified the union of its intention to implement changes and had given the union opportunity to present counterproposals.

It seems clear that Winn-Dixie has complied with its statutory duty to bargain. Before implementing the change, it gave the union notice of its desire to raise wages and met with the union in a bargaining session at which the union presented counterproposals.

After the 1971 contract had expired, the company notified the union that it was once again experiencing a high employee turnover and that it wished to increase wages by 5.5%. After a bargaining hiatus caused by a decertification election which the union eventually won, the company reasserted its desire to raise wages. The union and the company then met on several occasions to discuss the proposed increase.

As the year 1972 drew to a close, the company informed the union that it wanted to implement the increase as soon as possible for fear that the Cost of Living Council guidelines would prohibit the raise if it were not made quickly. The union, which again wanted to discuss numerous changes in the terms and conditions of employment, continued to resist implementation of the wage increase. On January 29, 1973, the company, without the union's assent, granted increases ranging from 4.11% to 6.23%.

The ALJ found that the increases granted by the company differed significantly from the 5.5% increase the company had proposed to the union in their negotiating sessions. The ALJ found this to be a violation of section 8(a)(5) and (1) of the Act because it amounted to a unilateral increase in wages without giving notice to the union and without giving the union a meaningful opportunity to make counterproposals. The Board affirmed.

As discussed above, the law in the Fifth Circuit is that a company may unilaterally increase wages if it first notifies the union of its intentions and allows the union meaningful opportunity to negotiate. It seems clear to us that implementing changes significantly different from those proposed to and rejected by the collective bargaining representative is tantamount to implementing changes without notifying the union of the proposed changes. *Cf. NLRB* v. *Katz*, 369 U. S. 736, 82 S. Ct. 1107, 8 L. Ed. 2d 230 (1962) (unilateral grant of wage increase higher than that proposed to and rejected by union). We agree that, with respect to the changes actually implemented, the union had neither notice nor opportunity to respond.

### *Surface Bargaining*

The union complains of the Board's failure to find the company guilty of other unfair labor practices. Only one of these supposed violations merits discussion.



Among the initial charges it filed in this case the union, as charging party, alleged that the company had acted in overall bad faith in its dealings with the union. According to the union, Winn-Dixie had acted as though no collective bargaining representative of the employees existed. The regional director refused to include this charge in the complaint and, on appeal by the union, the general counsel affirmed the regional director's decision.

Despite the absence of a charge of overall bad faith, or "surface bargaining," the ALJ believed that this issue was properly before him and decided that the company was in fact guilty of engaging in surface bargaining. The Board reversed on the ground that the general counsel, who has control of the scope of the proceedings under section 3(d) of the Act, did not include this charge in the complaint or attempt to litigate the issue. According to the Board, the ALJ misunderstood the general counsel's position regarding the presence of the surface bargaining issue.

Section 3(d) of the Act leaves to the general counsel the decision as to what is and what is not at issue in an unfair labor practice hearing. The union does not contend that the ALJ has the power to allow the complaint to be amended without the consent of the general counsel, nor does it contend that the ALJ is free to find an unalleged violation based on evidence presented over the general counsel's objection. Rather, the union contends that the ALJ correctly understood the general counsel's position to be that the sum of the individual allegations in the complaint gave rise to a surface bargaining charge.

While the general counsel's position was a bit ambiguous, we believe that the Board was correct in deciding that he had not acquiesced in the expansion of the scope of the hearing. During the course of the proceeding, the general counsel objected to the introduction of all evidence not relevant to the specific allegations in the complaint. Although the general counsel advised the ALJ that he was free to find a surface bargaining violation if

the evidence pertaining to the specific violations charged in the complaint was sufficient to make the surface bargaining issue "fully litigated," an accurate statement of the law in the Fifth Circuit, *see NLRB* v. *Sunnyland Packing Co.*, 557 F. 2d 1157 (5th Cir. 1977), the ALJ, over the general counsel's objection, admitted evidence not relevant to the specific allegations. Since the ALJ apparently misconstrued the general counsel's statements and expanded the scope of the hearing without his consent, we conclude that the Board acted within its discretion in reversing the ALJ's finding.

*Remedies*

Both the company and the union complain of the remedies fashioned by the Board. The company contends that the Board has gone too far; the union contends that the Board has not gone far enough. We note at the outset that this court can refuse to enforce an order of the Board only if the Board's remedy is a patent attempt to achieve some goal other than those underlying the Act or the Board's remedy is unduly burdensome on the employer. *See Fibreboard Paper Products Corp.* v. *NLRB*, 379 U. S. 203, 85 S. Ct. 398, 13 L. Ed. 2d 233 (1964).

We think that the company's objections to the monetary relief ordered by the Board are persuasive. To remedy the harm flowing from the company's violations with respect to the profitsharing/retirement plan, the Board ordered the company to reinstate the accounts of those employees who forfeited their interests as a result of the 1970 bargaining agreement, to establish accounts for those employees who would otherwise have become eligible for inclusion in the company plan, to make appropriate annual contributions to these accounts and to pay the employees the annual bonuses of up to $300 which they would otherwise have received.

Since we have refused to affirm the Board's finding that the forfeiture of the then-existing accounts resulted from violations of the Act, we naturally refuse to enforce the reinstatement



aspect of the Board's remedy. Forfeiture of those accounts resulted from the union's acceptance of the New Orleans contract and not from any refusal to bargain on the part of Winn-Dixie.

Even though the company did violate its duty to bargain by refusing to discuss the possibility of coverage under both the union pension plan and the company's profitsharing/retirement plan, we are unable to enforce that part of the Board's order which requires the company to create accounts for those employees who would have become eligible since the 1970 bargaining agreement, to make annual contributions to those accounts, and to pay those employees the annual cash payment of up to $300 to which they would have been entitled. The Board justifies this remedy as an effort to recreate the status quo ante existing before adoption of the 1970 contract. It obviously does not. The unit employees have been covered by the pension plan proposed by the union since 1970. The Board order creates a status novus which would exist only if the employees had succeeded in getting simultaneous coverage under both the union's pension plan and the company's profitsharing/retirement plan.

Although we share with the Board a concern that the employees cannot be made whole for any harm they may have suffered as a result of the company's refusal to bargain over "double coverage," we think that the Board's remedy here is too speculative and that it is unduly burdensome on the employer. Even though the company violated the Act, there is no way to evaluate, or even to identify, the harm flowing to the employees as a result of that violation. We therefore refuse to enforce all parts of the Board's order requiring the company to provide monetary relief for violations relating to its profitsharing/retirement plan.

The ALJ, who had found Winn-Dixe guilty of surface bargaining, ordered the company to remedy any harm the Jacksonville warehouse employees may have suffered as a result of Winn-Dixie's violations by paying those employees the difference

if any, between the benefits received by the unit employees and the benefits received by employees at a comparable non-unionized Winn-Dixie warehouse. Although the Board reversed the ALJ's finding of surface bargaining, it affirmed the remedy in an effort to make whole the employees for any losses they may have suffered as a result of the company's unilateral increases in insurance benefits and wages and other unfair labor practices.

Of course, the Board cannot fashion remedies on the basis of an assumption as to what the parties would have agreed to absent an employer's failure to bargain in good faith. *H. K. Porter Co.* v. *NLRB*, 397 U. S. 99, 90 S. Ct. 821, 25 L. Ed. 2d 146 (1970); *Ex-Cell-O Corp.*, 185 N. L. R. B. 107 (1970), *enf'd as modified sub nom., International Union, U. A., A & A. Imp. Wkrs.* v. *NLRB*, 145 U. S. App. D. C. 384, 449 F. 2d 1046 (1971). But the Board's theory here is not that the union and the company would have agreed to terms identical to those in a comparable warehouse; rather, the Board assumes that had there been no union representation in the Jacksonville warehouse those employees would have received the same benefits as the employees in a comparable warehouse.

We are unable to enforce this effort of the Board to surmount the problem it recognized in *Ex-Cell-O*. The theory behind this remedy rests on two assumptions, both of which we believe to be unfounded. First, the Board assumes that the company had a policy of uniform benefits for all its employees, both in Jacksonville and elsewhere. We cannot find substantial evidence for this finding in the record. Company witnesses did testify that the company's insurance plan and profitsharing/retirement plan were companywide. But this hardly means that other benefits such as wages, vacation time, coffee breaks, etc. are uniform. One company witness stated the company tried to keep the cost of benefits on a "relatively even keel" for all employees. However, this one statement cannot amount to substantial evidence to support a finding that the benefits



to the employees were uniform. We are especially reluctant to characterize this as substantial evidence since the existence *vel non* of uniform benefits was not at issue in the proceedings before the ALJ. The company had no notice that the ALJ would make a finding on this subject and thus had no opportunity to present evidence to the contrary.

The second assumption underlying the Board's theory is that any differences between benefits received by these unit employees and the employees at a comparable warehouse are due to the company's unfair labor practices. But if there are any differences they may be due to other factors, e.g., the skill or lack thereof of the union negotiator, the presence or absence of competing employers in the vicinity of a "comparable" warehouse, the attitudes of the various warehouse managers toward employee compensation, etc.

Given the dubious nature of these two assumptions, we think the Board's remedy is simply too speculative and thus unduly burdensome. We are reinforced in this belief by contemplating the problems we envision in trying to compare the value to an employee of various forms of benefit. If, say, the employees at one warehouse have one more day of sick leave per year than those at the Jacksonville warehouse and the Jacksonville employees get $.05 more per hour, then what is the net difference in benefits?[6] The Board admits that these employees may not have been harmed at all as a result of Winn-Dixie's failure to bargain. We think that the Board's effort to measure the extent of those damages by comparison of benefits in a similar warehouse an inappropriate method of evaluating the extent of what may be a nonexistent harm.

6. When the element of timing is added, the matter becomes even more perplexing. In comparing company benefits over the eight years since the company's first violation involved in this case, one might well run into the problem of evaluating the difference between receiving a $.05 per hour increase on June 2, 1972, and having an extra five minutes added onto the morning coffee break as of February 9, 1975.

The union contends that the remedies ordered by the Board are insufficient. Specifically, the union argues that the Board should have awarded it litigation and excess organization expenses.

The ALJ awarded litigation expenses to the union on the ground that the union had gone to great trouble and expense in its efforts to vindicate the section 7 rights of these employees. The Board, relying on its decision in *Tiidee Products, Inc.*, 194 N. L. R. B. 1234 (1972), reversed. In *Tiidee* the Board held that if a company's defenses to an unfair labor practice charge were debatable, an award of litigation expenses would be improper. In the instant case, the Board found Winn-Dixie's defenses debatable and accordingly refused to grant litigation expenses.

In *NLRB* v. *Food Store Employees Local 347* [*Heck's*], 417 U. S. 1, 94 S. Ct. 2074, 40 L. Ed. 2d 612 (1974), the Supreme Court specifically approved the Board's debatable-frivolous standard. In *Heck's* the court of appeals had awarded the union litigation expenses even though the Board had refused to do so. Although the employer had a long history of labor violations, the Supreme Court reversed the court of appeals and held that the decision not to award litigation expenses when an employer asserts debatable defenses was within the Board's discretion:

> We cannot say that the Board, in performing its appointed function of balancing conflicting interests, could not reasonably decide that where "debatable" defenses are asserted, the public and private interests in affording the employer a determination of his "debatable" defenses, unfettered by the prospect of bearing his adversary's litigation costs, outweigh the public interest in uncrowded dockets.

417 U. S. at 8-9, 94 S. Ct. at 2079. We find *Heck's* controlling. The Board's denial of litigation expenses was well within its discretion.



The union's claim for excess organization expenses can be dealt with just as summarily. The ALJ found that the only organizational activities of the union during the relevant time period took place in connection with the decertification election in 1969. He also found that the union had not established the requisite "nexus" between any excess organization costs and Winn-Dixie's unlawful conduct. The Board will not grant excess organization expenses unless such a "nexus" exists. *See Tiidee Products, supra.* The ALJ and the Board correctly found that the necessary connection was lacking in this case.

All other aspects of the Board's order are enforced.

ENFORCEMENT ORDERED IN PART AND DENIED IN PART.

## APPENDIX B

Nos. 76-2733, 76-3558.

UNITED STATES COURT OF APPEALS,
Fifth Circuit.

June 26, 1978.

WINN-DIXIE STORES, INC.,
*Petitioner-Cross Respondent,*

*vs.*

NATIONAL LABOR RELATIONS BOARD,
*Respondent-Cross Petitioner.*

AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO,
*Petitioner,*

*vs.*

NATIONAL LABOR RELATIONS BOARD,
*Respondent.*

Charles F. Henley, Jr., William H. Andrews, Jacksonville, Fla., for Winn-Dixie Stores.

Elliott Moore, Deputy Associate Gen. Counsel, William R. Stewart, David F. Zorensky, John S. Irving, John E. Higgins, Jr., Carl L. Taylor, Washington, D. C., for N. L. R. B.

Linda R. Hirshman, Robert S. Sugarman, Joseph M. Jacobs, Chicago, Ill., for Amalgamated Meat Cutters & Butchers Workmen of North America, AFL-CIO.



Petitions for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board.

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion 2/17/78, 5 Cir., 1978, 567 F. 2d 1343).

Before WISDOM and GEE, *Circuit Judges*, and VAN PELT,* *District Judge.*

PER CURIAM:

The petitions for rehearing are DENIED, and no member of this panel nor judge in regular active service on the court having requested that the court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12), the petitions for rehearing en banc are DENIED.

The opinion of this panel is amended by adding immediately after the third full paragraph at 567 F. 2d 1348 the following two paragraphs:

> The Board found that the company plan mandated: (1) that employees covered by a union pension plan could not continue to participate in the company plan, and (2) that employees covered under a union pension plan must forfeit any account they already have under the company plan. Thus, according to the Board, just as the company's refusal to bargain over continued coverage under the company plan along with coverage under the new union plan was based on clause 2.4(b), the company's refusal to bargain over what would happen to existing employee accounts was likewise based on clause 2.4(b) and other clauses in the plan. While we have found substantial evidence on the record to support the Board's position as to

* Senior District Judge of the District of Nebraska, sitting by designation.

the company's refusal to bargain over double coverage, the record does not present substantial evidence to support the finding that the provisions of the plan mandated forfeiture of existing accounts or that the company violated its duty to bargain by insisting on forfeiture.

In its brief, the Board cites several clauses in the plan, namely sections 7.3(d) and (e) and 7.4,[4a] dealing with forfeiture of vested or partially vested accounts. Article VII, clause 7.3(d) provides that if a participating employee voluntarily *terminates his employment* or is discharged by his employer for conduct detrimental to the best interest of his employer and that employee is less than 35 years old, his entire account is forfeited. Clause 7.3(e) provides that all amounts forfeited by the *termination of employment* are to be allocated to the accounts of employees who continue to participate in the plan. Section 7.4 provides that

4a. *Section 7.3—Partially Vested Accounts*

In the event that a participating employee voluntarily terminates his employment or is discharged by his employer for conduct which, in the sole discretion of the Committee, is detrimental to the best interest of his employer (except as modified by Section 7.4 below) the amount then standing to the credit of his account shall be used and disposed of as follows:

* * * * *

(d) If such employee has not attained age thirty-five (35), the entire amount or value of his account shall be forfeited.

(e) All amounts forfeited by the termination of employment of any employee shall be allocated and credited to the accounts of the participating employees of his Employer as hereinabove provided.

*Section 7.4—Forfeited Accounts*

In the event that any participating employee is discharged by his Employer for theft, embezzlement or other dishonesty, and the Employer shall submit to the Committee a written confession by such employee or shall submit to the Committee proof satisfactory, in the sole discretion of the Committee, that such employee has committed an act of theft, embezzlement or other dishonesty, the entire account of such participating employee shall be forfeited and shall be allocated and credited to the accounts of the other participating employees of such Employer as above provided.



if the company discharges an employee for theft, embezzlement or other dishonesty, his account will be forfeited and allocated in a manner identical to that provided for by section 7.3(e). These forfeiture provisions obviously do not apply in circumstances, such as those here, where an employee becomes covered under a union pension plan. Furthermore, in Article II, which defines the terms used in the plan, "forfeiture" is defined as "that portion of the account of a withdrawn employee to which he shall not be or become entitled." A "withdrawn employee" is, in turn, defined in section 2.13 as "a participating employee whose employment has been terminated prior to his death, disability or retirement . . . ." Thus, the plan deals with forfeiture only in the context of employees who no longer work for the company. In sum, the plan says nothing about forfeiture of existing accounts of employees who become covered by a pension plan as a result of collective bargaining.

We write this addition to our prior opinion to make clear that we do not hold that employee acceptance of an illegal proposal results in a waiver of employee rights. Our holding is that: (1) the company plan did not mandate forfeiture, and (2) the company's bargaining position regarding forfeiture was not illegal since it did not insist on that proposal in such a way as to violate its duty to bargain. The company was insisting only that the union take the entire Teamster deal or continue with provision-by-provision bargaining. Since the company bargained in good faith as to the forfeiture provision, there is no violation of 8(a)(3) or 8(a)(5). *See* Solo Cup Co., 176 N. L. R. B. 823, 824 n. 3, 71 LRRM 1316, 1318 n. 3 (1969).

The union's petition for rehearing also assails this court's refusal to enforce the Board's order that the company create accounts for all employees who would have been included in the company plan and that the company make deposits and payments with respect to those accounts as though they had existed

since 1970. According to the union, our ruling means that an employer can discourage unionization, refuse to bargain, and yet not be forced to compensate his victims.

Although we are aware of the employees' plight, we cannot enforce a so-called "compensatory" remedy when there is no way to identify or quantify in real-world terms the harm suffered by the employees. The Board's remedy is simply too speculative, *see Kroger Co.* v. *NLRB*, 401 F. 2d 682, 688-89 (6th Cir. 1968), cert. denied, 395 U. S. 904, 89 S. Ct. 1742, 23 L. Ed. 217 (1969), and the Board's rationale of recreating the status quo cannot withstand even the limited scrutiny we apply to Board orders. *See Winn-Dixie Stores, Inc.* v. *NLRB*, 567 F. 2d 1343, 1351 (5th Cir. 1978); *Kroger, supra.* The only theory under which the extent of the harm could be set at the loss of participation in the company plan since 1970 is that the parties would have agreed to such continued coverage, in conjunction with coverage under the union plan, if the company had not maintained a discriminatory provision in its plan and had bargained in good faith. The Board does not purport to justify its order on such a theory, and, as we noted in our original opinion, 567 F. 2d at 1351-52, the Board has recognized that it cannot fashion remedies on the basis of an assumption that the parties *would* have reached agreement on a specific provision.



## APPENDIX C

224 NLRB No. 190

MFJP
D-773
Jacksonville, Fla.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

| | |
|---|---|
| WINN-DIXIE STORES, INC., and AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO. | Case 12-CA-4695 |

### DECISION AND ORDER

On September 5, 1974, Administrative Law Judge Joel A. Harmatz issued the attached Decision in this proceeding. Thereafter, the Respondent, the Acting General Counsel, hereafter referred to as General Counsel, and the Charging Party filed exceptions with supporting briefs, the Respondent filed an answering brief to the General Counsel's exceptions and supporting brief, and the Charging Party filed an answering brief to the Respondent's exceptions and supporting brief.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge with the following modifications.

1. We agree with the Administrative Law Judge insofar as he found various violations of Section 8(a)(1) and (5) of the Act.

The General Counsel and the Charging Party contend, contrary to the Administrative Law Judges conclusion, that the Respondent also violated Section 8(a)(1) of the Act by maintaining an exclusionary clause in its pension/profit-sharing plan whereby employees subsequently covered by any other pension plan would automatically be excluded from Respondent's plan with forfeiture of all previously vested interests; Section 8(a)(3) of the Act by excluding its employees at the Jacksonville, Florida, warehouse from its pension/profit-sharing plan when they became covered by the Charging Party's pension plan with a resultant forfeiture of the employees' previously vested interests in Respondent's plan; and Section 8(a)(5) of the Act by refusing to bargain with the Charging Party over automatically excluding employees covered by some other form of retirement program established through the process of collective bargaining and by refusing to bargain with the Charging Party over the forfeiture of employees' previously vested interests in Respondent's pension/profit-sharing plan. We find merit in these contentions.

The record shows that for many years Respondent has maintained its profit-sharing plan. To be eligible to participate, an employee must be employed for a period of 5 years. Contributions are made into a fund with *pro rata* personal accounts being set up for each participating employee. Benefits become due upon an employee's death, disability, or normal retirement, or upon discharge after reaching retirement age for other than various serious breaches of conduct. Benefits are made in periodic payments and, except for very limited exceptions, none of the payment options involves a lump sum payment. Benefit payments continue until the employee's account is exhausted. The plan also permits those employees who earn less than $8,500 annually to take out in cash payments each year a sum up to $300.

Comparing the instant facts with those present in *The Kroger Co.*, 164 NLRB 362 (1967), enfd. 401 F. 2d 682 (C. A. 6,



1968), cert. denied 395 U. S. 904 (1969), the Administrative Law Judge concluded that the pension/profit-sharing plan was in fact a retirement- or pension-type plan, that it was not inconsistent with the principles of good-faith bargaining for the Respondent to insist adamantly on either one plan or the other but not both, and that Respondent's position during bargaining did not violate Section 8(a)(1), (3), or (5) of the Act.

In our opinion, the Administrative Law Judge has misconstrued the scope of Respondent's pension/profit-sharing plan and, in doing so, incorrectly applied the principles set out in the *Kroger Co.* case. In *Kroger*, the Board found that the employer violated Section 8(a)(1), (3), and (5) of the Act by maintaining an exclusionary clause in its pension/profit-sharing program similar to the exclusionary clause set out as article II, section 2.4(b), of Respondent's plan.[1] In *Kroger*, as in the case herein, the exclusionary clause provided for the exclusion of, or ineligibility to participate on the part of, employees covered by some other form of retirement program. In the instant case, during the course of bargaining in 1969 up through the execution of the February 6, 1971, contract, Respondent adamantly took the position that the employees could be covered by either Respondent's plan or the Union's plan, but that the employees could not be covered by both. Thus the issue here is whether the Respondent's position taken and maintained up until June 25, 1971, when the plan was amended violated the Act. In

1. Art. II, sec. 2.4(b) excludes:

> Employees who, as a result of collective bargaining, have entered into a written agreement by which Employer agrees to contribute funds for the benefit of such employees to some form of Pension Retirement Program (other than "Program" herein).

On June 25, 1971, following the execution of the February 6, 1971, contract art. II, sec. 2.4(b) then excluded:

> Employees who, as a result of collective bargaining, have entered into a written agreement with the Employer by which the Employer has agreed to contribute funds for the benefit of such employees to some form of Pension or Retirement Program (other than "Program" herein) and who have been excluded from this Program by agreement of the parties.

*Kroger,* the issue was whether or not the exclusionary clause in the Kroger profit-sharing plan, as distinguished from Kroger's pension plan, discriminated against employees engaging in protected concerted activities. In *Kroger,* the end result, simply stated, was that employees represented by the union had a pension plan, whereas unrepresented employees had a pension plan *and* a profit-sharing plan, a situation that clearly discriminated against those employees who had elected to engage in collective bargaining.

We do not agree with the Administrative Law Judge's conclusion that the instant plan is simply a retirement or pension plan. In our opinion, Respondent's plan is nothing more than a bonus plan or, as it has been frequently referred to, a profit-sharing plan. Under article III of the plan, the Respondent's annual contributions are limited to certain percentages of "the consolidated net income" of the Respondent and its several subsidiaries. Obviously, if there is no "consolidated net income," under the terms of the plan there would be no contribution to the fund. On the other hand, the bonus characteristics of the fund are clearly shown by the fact that after the closing of the fiscal years ending June 1968 and June 1969, Respondent's board of directors passed resolutions noting:

> WHEREAS, Employer has realized an increase in sales and profits for the fiscal year ending June 29, 1968. . . .[2]

In each of these resolutions, the board of directors authorized contributions which, if they were in fact higher than those provided for under the terms of article III of the plan, were to be paid in at the higher level.[3] In these circumstances, eligible employees could only expect contributions to their accounts if there was a profit, and possible additional contributions in any given year only if profits were higher than under normal conditions. In addition, eligibility to participate in the plan's benefits

2. The identical resolution was passed for the 1969 fiscal year.

3. Both resolutions clearly limited the increased contributions to the respective fiscal years.



is substantially limited in that only those employees who have been continuously employed for a period of at least 5 years are eligible, and even then eligibility only becomes final if and when an employee, otherwise eligible, applies for participation in the plan. In our opinion, the fact that enjoyment of the benefits derived from Respondent's contributions is deferred until a point of time normally associated with retirement does not alter the basic makeup of the plan.

However, even if we were to agree with the Administrative Law Judge's conclusion that the plan is a retirement plan, we would still reach the same results insofar as the violations of the Act are concerned and the remedy appropriate thereto. Accepting, *arguendo,* the Administrative Law Judge's conclusion that Respondent's plan is a retirement plan, and that, therefore, an employer can insist on one plan or the other, it is clear that Respondent's plan in fact includes an aspect which is unrelated to retirement. Under the terms of article VI, section 6.2, one-third of the annual contribution allocated to any participating employee whose income for the preceding fiscal year was less than $8,500 *"shall be paid to him in cash* . . . PROVIDED HOWEVER, such cash payment shall, in no event, exceed $300.00 in any year." Under this phase of the plan, most if not all of the unit employees eligible to participate in the plan would receive an annual distribution of a sum of money.[4] In these circumstances, again accepting *arguendo* the contention that the plan is a retirement plan, it is also clear that the plan is in part a profit-sharing plan. Notwithstanding this, Respondent, through the plan's exclusionary clause, precluded any bargaining on the profit-sharing aspect of the plan and, in accord with the exclusionary clause, Respondent's negotiators would not discuss and adamantly insisted that the Union take either its own plan or Respondent's plan. In these circumstances, it is clear that Respondent violated Section 8(a)(5) and (1) of

4. Based on the wage rates in effect in the 1969-71 period, and absent extraordinary overtime work, the annual compensation of each of the employees in the unit would be substantially less than $8,500.

the Act by refusing until June 25, 1971, to bargain over the various aspects of the plan and also violated Section 8(a)(3) of the Act by unlawfully excluding eligible unit employees from in any way participating in the plan. From this, it also follows that Respondent's adamant insistence that all employees covered by the Union-sponsored plan forfeit their interests in the plan violated Section 8(a)(5) and (1) of the Act, and that Respondent's actual forfeiture of the unit employees' interests in the plan violated Section 8(a)(3) of the Act.[5]

In any event, whether the plan is designated a profit-sharing plan or a retirement plan plus a profit-sharing plan, the Union, as the certified representative of the unit employees, had the right to negotiate all aspects of the plan, and the Respondent had the obligation to negotiate and bargain in good faith with the Union as to all aspects of the plan. The vice in Respondent's conduct, however, is that with its absolute take-it-or-leave-it position it refused to bargain over any aspect of the plan, thus denying to the unit employees their rights under Section 7 of the Act. Accordingly, to remedy this unfair labor practice, we shall issue an order restoring the *status quo ante*, making the employees whole for the losses they have suffered as a result of Respondent's unfair labor practices, and requiring the Respondent to bargain with the Union with regard to the profit-sharing plan.

2. We agree with the Respondent that the Administrative Law Judge's ruling that the Charging Party's contention that the Respondent had engaged in surface bargaining and that the issue was properly before him for resolution was erroneous. The record shows that in the initial charge filed herein, the Charging Party alleged numerous violations of Section 8(a)(5) and (1) of the Act, including, *inter alia*, that Respondent failed and refused to bargain in good faith. Following investigation, the Regional Director dismissed the charges in their entirety. Thereafter, the Charging Party appealed the dismissal by the Regional Director to the General Counsel. Although the appeal was granted in part, the complaint which issued alleged only various specific conduct as being violative of Section 8(a)(5) of the Act.

5. During the course of the hearing, Respondent represented that although the 1970 and 1971 contracts provided for forfeiture of the employees' individual accounts in the plan, the accounts of the unit employees were being held, apparently in some form of escrow, pending the outcome of this case.



During the course of the hearing, the General Counsel introduced evidence directed toward establishing that Respondent by various acts and conduct had violated Section 8(a)(5) of the Act. Thereafter, the Charging Party attempted to introduce into the record evidence of other conduct in support of its contention that the Respondent had engaged in surface bargaining throughout the period involved. In each instance when the Charging Party attempted to introduce such evidence into the record, both the General Counsel and the Respondent objected to the admission of such testimony on the grounds that the questions went beyond the scope of the complaint. In the various ensuing colloquies following objection to certain lines of examination, the General Counsel steadfastly adhered to his position that it was his intention "to limit this case, insofar as possible, to the allegations of the complaint."

Notwithstanding the General Counsel's position and objection to the admission of any evidence that went beyond the scope of the complaint, the Administrative Law Judge, in his Decision, concluded that the General Counsel, in practical effect, had taken a position which rendered the Charging Party's contention as to surface bargaining a viable issue in this case. Following this, the Administrative Law Judge received into evidence testimony regarding certain conduct proffered by the Charging Party in support of its claim that Respondent engaged in surface bargaining, and based on such testimony concluded that Respondent had in fact engaged in surface bargaining in violation of Section 8(a)(5) of the Act.

After a careful review of the record, we reject the conclusion of the Administrative Law Judge that the General Counsel in

effect acquiesced in permitting the Charging Party to extend the allegations of the complaint. Section 3(d) of the Act gives the General Counsel the "final authority" over the "investigation of charges and issuance of complaints under section 10" of the Act. The authority of the Administrative Law Judge to amend the complaint under Section 10(b) of the Act is clearly limited to those instances where the amendment is sought or consented to by the General Counsel, or where evidence has been received into the record without objection.[6] As noted above, the original charge contained an allegation that Respondent engaged in bad-faith bargaining. This charge was rejected by the Regional Director and, on appeal to the General Counsel, the dismissal of this portion of the charge was sustained. The record also shows that the General Counsel during the entire course of the hearing consistently objected to the admission of any evidence which went beyond the scope of the allegations in the complaint.[7] At the same time, the record also shows that on two occasions, the General Counsel moved to amend the complaint as to specific allegations, neither of which was in any way related to the Charging Party's contention that Respondent engaged in surface bargaining. In such circumstances, particularly the General Counsel's refusal to amend the complaint to include an allegation of surface bargaining and his objection to the admission of any evidence beyond the scope of the complaint, the Administrative Law Judge's conclusion that the General Counsel's "position" had "rendered the Charging Party's contention as to surface bargaining a viable issue in this case" is without support in the record and is hereby reversed.[8] Accordingly, we do not adopt those portions of the Administrative Law Judge's Decision relating to the surface bargaining issue.

6. *International Union of Electrical and Machine Workers, AFL-CIO [NECO Electrical Products Corp.]* v. *N. L. R. B.*, 289 F. 2d 757 (C. A. D. C., 1960); *N. L. R. B.* v. *Raytheon Company*, 445 F. 2d 272 (C. A. 9, 1971).

7. In other instances when Respondent objected to certain questions propounded by the Charging Party, the General Counsel invariably joined in the objection, again citing the fact that the evidence sought to be introduced went beyond the scope of the complaint.



3. We also find merit in Respondent's exceptions to the Administrative Law Judge's award of litigation expenses to the Charging Party. In *Heck's Inc.*, 215 NLRB No. 142 (1974), the Board reviewed and fully considered the question of the award of litigation expenses and court costs to a charging party. In our decision in *Heck's*, we reaffirmed our position[9] that the award of litigation expenses, except in extraordinary circumstances involving frivolous defenses, would discourage respondents from gaining access to the appropriate forum in order to fully litigate "debatable" defenses.

Applying this principle to the instant case, it is clear that Respondent's defenses were not frivolous. As noted earlier, the original charge was dismissed by the Regional Director, and it was only after an extended review of the case on the Charging Party's appeal to the General Counsel that a very limited and specific complaint issued. The complaint alleged 6 independent violations of Section 8(a)(1) of the Act, 13 independent violations of Section 8(a)(5) of the Act, and 1

8. *GTE Automatic Electric, Inc.*, 196 NLRB 902 (1972).

9. *Tiidee Products, Inc.*, 194 NLRB 1234, 1236 (1972); 196 NLRB 158 (1972).

JD-595-74

SOLICITATION OR LITERATURE DISTRIBUTING.

1. No employee shall solicit any other person employed at the same location during the work-time of either or at any time in the work or public areas of company property. No employee shall solicit at any time on company property any other person employed by the company at a different location. No person (employee or non-employee) shall distribute literature at any time on company property, and no nonemployee shall be permitted to solicit at any time on company property, or during the work-time of the employee when off company property.
2. Company property shall include all premises owned, leased, or being used by the Company for business purposes, including parking lots, retail stores, warehouses, office buildings, garages, manufacturing plants, etc.
3. Solicitation or literature distribution shall be understood to include, but not be limited to, the following: Subscriptions for magazines or other periodicals, insurance, membership in organizations, including labor unions, cash donations; and the distribution of any written matter, except when specifically authorized by the company.

WINN-DIXIE STORES, INC.

Insofar as said restrictions apply to solicitation, employees, absent authorization from the Respondent, are expressly precluded from engaging in this form of protected activity on company property during their nonworking hours. Similarly with respect to distribution of union literature, employees, absent authorization from Respondent, are precluded from



engaging to refuse to bargain with the above-named labor organization, thereby violating Section 8(a)(5) of the Act.

2. By adamantly insisting on and refusing to bargain with the above-named labor organization over the forfeiture of the vested rights of unit employees in the pension/profit-sharing plan who became covered by a pension plan resulting from collective bargaining through the above-named labor organization, Respondent has violated and continues to violate Section 8(a)(5) and (1) of the Act.

3. By forfeiting the vested rights of unit employees in the pension/profit-sharing plan who became covered by a pension plan resulting from collective bargaining through the above-named labor organization, Respondent has violated and continues to violate Section 8(a)(3) and (1) of the Act.

*The Remedy.*

The Administrative Law Judge, having concluded that Respondent did not violate the Act with regard to the pension/profit-sharing plan, made no recommendations for a remedial order with regard to this matter. Having found that Respondent violated Section 8(a)(1), (3), and (5) of the Act, we shall enter an appropriate order. With regard to the maintenance of the exclusionary clause, although Respondent, on June 25, 1971, amended the clause to eliminate automatic exclusion, we will require the Respondent to cease and desist from maintaining any such exclusionary clause and to post a notice to this effect. Further, we shall order the Respondent to cease and desist from making any changes in its pension/profit-sharing plan insofar as it may affect employees in the appropriate unit without first notifying the Union as to proposed changes and bargaining with the Union upon its request with regard to any such proposed at the negotiating session. Webb, prior to returning to work, left the "notes" on a table in the break area. Later, he observed one Charles Soles, a conceded

supervisor,[10] going through the material left by Webb in the break area. Webb, having observed this, sought out Drug Superintendent Koontz, reporting that Soles was going through his personal belongings. Webb urged Koontz to instruct Soles not to tamper with his belongings. Koontz after discussing the matter with Soles apparently was satisfied that Soles did not know that the material found in the break area belonged to Webb, and apparently decided that Webb had acted improperly in "jumping" on Soles for simply doing his duty; i.e. attempting to identify what may well have been a misplaced business item. Accordingly, Koontz instructed Webb to return to work, but then called for Service Superintendent Parsons.

On Parsons arrival, Webb was called back to Koontz' office. Koontz at that time reported to Parsons that Webb had flared up at a supervisor without justification. What transpired next is the subject of conflicting testimony. According to Webb, Parsons told him that he was tired of Webb going around doing all this union stuff, and further stated "Webb, I want you to stop this union stuff." Parsons also referred to the above solicitation rule posted on the bulletin board and told Webb to read it.

Neither Parsons nor Soles testified. According to Koontz however, Parsons simply informed Webb that Soles acted properly and that Parsons verbally reprimanded Webb for his unjustified reaction towards a supervisor. According to Koontz, Webb became upset, and asserted that he was being picked on because of his union activity. Parsons allegedly responded by stating that he didn't want any talk about the Union, that the incident had nothing to do with the Union, and that the issue was limited to why Webb jumped on a supervisor for doing his job. Koontz relates that this was the only reference to the Union in the entire incident.

10. Soles before his advancement to a supervisory position, was the employee sponsor of the decertification petition which led to the election conducted on July 23, 1969.



I credit Webb over Koontz and find that he was instructed to refrain from union activity by Parsons. Koontz' version was not persuasive and I consider the account of Webb as the more probable. Most significant is the fact that Koontz substantiated Webb's testimony that Parsons in the course of this encounter referred Webb to the posted no solicitation, no distribution rule.[11]

We have also carefully considered the Administrative Law Judge's recommendations as to the remainder of the remedy, and the Respondent's exceptions thereto, and, although we have made no finding with regard to the Administrative Law Judge's conclusion that Respondent engaged in "surface" bargaining, a conclusion on which the Administrative Law Judge relied in major part in fashioning his recommended remedy, we are of the opinion that Respondent's conduct found violative of the Act herein is of sufficient gravity to justify the application of his recommendations at this time. Accordingly, we adopt the Administrative Law Judge's recommendations that, in addition to posing the required notice to employees, Respondent mail a copy of the notice to each employee, that the notice be read to groups of employees by company officials, that the notice be posted at all of the Respondent's facilities within the Jacksonville division, and that the Union be granted access to bulletin boards and all places where notices are customarily posted in the Jacksonville warehouse for a period of 1 year.

In addition, in view of the fact that Respondent immediately following the Union's 1969 recertification violated Section

11. Koontz, in order to enforce his testimony that Parsons made no reference to the Union other than that set forth in the prior paragraph, points to the Company's "clear cut" policy that supervisors are not to discuss the Union in the presence of employees. However, I note that the unlawful statement imputed to Parsons by Webb would not necessarily seem afoul of that policy, for it is a fair assumption that supervisors were not precluded from enforcing by direct warnings, employee violations of the Company's declared policy against union solicitation. The statement attributed to Parsons through this allegation is consistent with Respondent's no solicitation rule and could be construed as an implementation of the plant policy embodied therein.

8(a)(5) by its unilateral grant of increased insurance benefits as well as its unilateral grant of the August 3, 1969, wage increase prior to any impasse in bargaining, we agree with the Administrative Law Judge that the certification year shall commence to run from the date Respondent complies with our Order herein.

We are also of the opinion that the unilateral granting of the aforementioned benefits as well as the unilateral wage increase of January 29, 1973, would necessarily impede the progress of collective bargaining, thereby possibly causing the unit employees to suffer the loss of enjoyment of benefits they might otherwise have received. Accordingly, we also adopt the Administrative Law Judge's recommendation that a comparable warehouse of Respondent be selected and a comparison and determination be made with respect to benefits the unit employees may have lost because of Respondent's unfair labor practices, and, in the event it is shown that unit employees have in fact suffered loss of benefits, that Respondent make the unit employees whole for such losses.

## ORDER.

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Winn-Dixie Stores, Inc., Jacksonville, Florida, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Promulgating maintaining, and enforcing an unlawful, broad no-solicitation rule which precludes employees from engaging in union activity on nonworking time.

(b) Promulgating, maintaining, and enforcing an unlawful, broad no-distribution rule which precludes employees from engaging in union activity in nonworking areas on nonworking time.



(c) Announcing increased insurance benefits so as to influence employees to refrain from designating a bargaining representative.

(d) Making substantial gifts, in the form of free dinners and door prizes, to induce employees to refrain from designating a bargaining representative.

(e) Instructing employees to stop engaging in union activity.

(f) Promulgating and maintaining an exclusionary clause which disqualifies or excludes from participation in its pension profit-sharing plan employees covered by a pension plan resulting from collective bargaining through a labor organization.

(g) Refusing to bargain collectively with Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, in the unit described below by adamantly insisting on and refusing to discuss with the said labor organization exclusion of unit employees from participation in Respondent's pension/profit-sharing plan upon being covered by another pension plan resulting from collective bargaining.

The appropriate unit is:

> All employees engaged in the receiving, shipping, and processing of all food and sundry products at the Employer's warehouse at Jacksonville, Florida; excluding all employees in the meat and cheese processing and packaging department, all garage and mechanical maintenance employees, carpenters, regular maintenance personnel, truckdrivers, and helpers, office clerical employees, guards, and supervisors as defined in the Act.

(h) Refusing to bargain collectively with the above-named labor organization by adamantly insisting on and refusing to discuss the forfeiture of the

vested rights of unit employees in its pension/profit-sharing plan who became covered by another pension plan resulting from collective bargaining.

(i) Refusing to bargain collectively with the said labor organization by, unilaterally, and without notice or prior consultation, granting wage increases or increased insurance benefits to employees in the above-described unit.

(j) Refusing to bargain in good faith by refusing to permit the Union to conduct inplant job studies through an independent engineer designated by the Union, and by denying union representatives access, free of any unreasonable conditions, to the warehouse for investigation of safety and sanitary conditions, and the extent to which supervisors perform unit work.

(k) Forfeiting the vested rights of unit employees in its pension/profit-sharing plan without first bargaining with the above-named labor organization over such forfeiture.

(l) Making any changes in its pension/profit-sharing plan that will affect the rights of unit employees without first notifying the above-named labor organization, and, upon its request, bargaining with it over such changes.

(m) In any other manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Upon request, bargain collectively and in good faith with the above-named labor organization, as the exclusive representative of all the employees in the unit described above, concerning unit employees' participation in its pension/profit-sharing



plan; forfeiture of the unit employees' vested interests in its pension/profit-sharing plan; changes in employees' insurance plans and benefits; employees' wage increases; and the right of engineers and representatives designated by the Union to access, free of any unreasonable conditions, to the warehouse for time and job studies, investigation of safety and sanitary conditions, and the extent to which supervisors perform unit work. Respondent shall also bargain as to wages, hours of employment, and other conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Reinstate in its pension/profit-sharing plan the accounts of those unit employees who were eligible to participate in the said plan as of February 6, 1970, and whose accounts were forfeited, and open accounts in the names of those unit employees who would have otherwise become eligible to participate in said plan subsequent to February 6, 1970, and prior to compliance with our Order herein.

(c) Make whole the employees referred to in subparagraph (b) immediately above by paying into said accounts a sum of money, the amount of which is to be determined hereinafter at the compliance stage of this proceeding in the manner explained in the section of this Decision entitled "The Remedy."

(d) Make whole employees in the appropriate unit at the Jacksonville warehouse for losses sustained in the totality of their wage and fringe benefit levels resulting from Respondent's impeding of the normal course of collective bargaining by virtue of its unfair labor practices herein; said amounts, if any, to be computed in the manner set forth in the section of the Administrative Law Judge's Decision entitled "The Remedy."

(e) Post at all its locations within the Jacksonville division copies of the attached notice marked "Appendix."[10] Copies of said notice, on forms provided by the Regional Director for Region 12, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(f) Mail a signed copy of said notice marked "Appendix" to each employee in the appropriate unit at the Jacksonville warehouse immediately upon receipt thereof from the Regional Director for Region 12.

(g) Convene during working time, by departments or shifts, all employees in said appropriate collective-bargaining unit at which a responsible official of the Respondent, namely, a department head or higher level official, shall read to said employees the contents of the attached notice marked "Appendix."

(h) Upon request of the Union, made within 1 month after issuance of a final order in this proceeding, or compliance herewith, immediately grant the Union and its representatives reasonable access, for a period of 1 year, to the bulletin boards at the Jacksonville warehouse and all places where notices to employees are customarily posted at said location.

10. In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."



(i) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(j) Notify the Regional Director for Region 12, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated, Washington, D. C. June 21, 1976.

BETTY SOUTHARD MURPHY,
*Chairman*

JOHN H. FANNING,
*Member,*

HOWARD JENKINS, JR.,
*Member,*

JOHN A. PENELLO,
*Member,*

*National Labor Relations Board*

(SEAL)